



Proposed Amendments to the Maine Rules of Professional Conduct and the Maine Bar Rules to Prohibit, and Require Continuing Education on, Harassment and Discrimination

1 message

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I oppose both the proposed amendments to the Maine Rules of Professional Conduct and the Proposed Amendments to the Maine Bar Rules to Prohibit, and Require Continuing Education on, Harassment and Discrimination. My opposition, as Don Quixote like as it may be follows below. While the Bar's aim here may be laudable, attempting to legislate or impose morality or "conduct" is fraught with danger, pitfalls, and has a history of either failure or unintended consequences. As I am also admitted in California, I have complied with their Anti-Bias CLE and obligations since 1992 (with extensive revisions to that State's rules taking effect this fall). I also believe professionalism and simple good manners support the concept, however, I grow weary of the constant imposition of restraints on behavior that do nothing but create causes of action and support an expansion of the cottage industry of CLE Providers attached to the legal profession akin to a remora on a shark (no pun intended).

PROPOSED AMENDMENTS TO THE MAINE RULES OF PROFESSIONAL CONDUCT:

The addition of Subsection (g) to the Rules would now state that "It is professional misconduct for a lawyer to:"

"engage in conduct or communication related to the practice of law that the lawyer knows or reasonable should know is harassment, or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity."

is highly subjective, and potentially void for vagueness. If, for instance I am defending a retail store in rural Maine and the plaintiff has certain characteristics that impact his (or her) presentation to a jury, but are part of the enumerated items above how can I communicate that to the plaintiff's counsel without potentially being considered "harassing" or "discriminatory"? As an example, suppose I have a plaintiff opponent who is a member of an ethnic group which is disfavored in the community and I have performed a Mock Jury which demonstrates that the value of his case is much less that it would be if he were not of this ethnic origin. Assume that I reference that in a Mediation Brief which is a "communication" or (more likely) simply apprise the other side that we believe that the settlement value is far less that they believe - may I tell them why? If I say, the jury won't like your plaintiff because he's Martian, and Martians are disfavored in this community, do I open myself up to a disciplinary proceeding if a complaint is lodged? Further, the phrase "reasonable [sic] should know" is based on whose reasonableness? Reasonableness is a concept that is fluid and can be highly subjective from both the side of the speaker and the listener. As an example from the real world, in *Ellison vs. Brady* 924 F.2d 872, 880 (9th Cir.1991) the court held that that the reasonable woman standard should be applied in assessing conduct alleged in sexual harassment claims as opposed to the reasonable man standard. The panel maintained that the court should focus on the perspective of the victim and

evaluate the victim's perspective against a reasonable perspective of an individual of the same gender. If I am communicating to a female or a male lawyer must my communication be different? Am I to take into account the particularly fragile attorney/litigant when communicating? Again, the doctrine of unintended consequences may come into play with this amendment.

PROPOSED AMENDMENTS TO THE MAINE BAR RULES:

The proposed amendment germane to this comment is replicated below:

(B) Qualifying harassment and discrimination education topics include conduct or communication related to the practice of law involving harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity.

Are there a great number of practicing lawyers in Maine who have not read the papers in the past year or listened to the drumbeat of #METOO on television or social media such that an hour of CLE will alter their behavior in a fashion consonant with today's arbiters? My opposition to the imposition of Continuing Legal Education is further based on the notion that people who have bad intentions will not be persuaded by an hour once a year of enlightenment, nor will human nature change because of such CLE. Some of these concepts need to be taught (and learned) in Kindergarten, or (horrors) perhaps by simply adhering to time-tested concepts such as "whatever you would that men should do to you, do you even so to them" Matthew 7:12 (King James). Quite frankly, if the general population behaved more in keeping with these strictures, there would be a great deal fewer discrimination claims and lawsuits. Accordingly, and in keeping with this thought why should we limit this training to lawyers. Perhaps all Maine citizens should be obligated to spend some time in "reeducation camps" so that we are all speaking a "party line" that does not offend.

While I recognize my stance is likely unwelcome, and may draw derision and a few brickbats, I simply ask "what will it truly accomplish"? I suspect that this will simply result in an increase in discipline cases for which the Board of Overseers and Supreme Judicial Court are responsible and will require additional funding along with imposing additional expense onto Maine Lawyers. I would be happy to discuss this opposition with anyone at the Court which would like further commentary.

Very Truly Yours,

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